fortuitously, were present in court, was in point of fact made by way of an originating motion, though the judgment therein referred to a notice of motion. Such cases went against the contention of learned counsel for the appellant, and in citing them to the court, learned counsel was acting in the very best traditions of advocacy.

It is, however, submitted that in *Yong Yoke Sung & Ors.* v. *Sungei Way Estate,*[5] the appeal from the decision of the Assistant Commissioner for Labour to the High Court was lodged by notice of motion. That may be so. The objection taken here was not made in that case and, in any event, to follow a precedent, which is obviously wrong, is no way of construing an ordinance or interpreting the rules.

The objection, therefore, succeeds but in all the circumstances of the case, I am of the opinion that the defect is not such as to render the proceedings a nullity and is merely an irregularity curable under Order 70 of the Rules of the Supreme Court. An appeal has been lodged against the decision of the Collector of Land Revenue, Kuala Kangsar, and notice of it had been served on the respondent as required under Order 59 rule 13(3) of the Rules of the Supreme Court. The defect occasioned by making the appeal by notice of motion and not by originating motion does not and cannot occasion any prejudice to the applicant herein which cannot be compensated by costs and, therefore, can be cured by amendments so that substantial justice might be done between the parties.

The applicant will have the costs of the application.

Order accordingly.

RENGASAMY PILLAI v. COMPTROLLER OF INCOME TAX

[F.C. (Barakbah L.P., Ismail Khan Ag. C.J. (Malaya) & Suffian F.J.) May 13, 1968]

[Penang — Federal Court Civil Appeal No. X87 of 1967]

Bankruptcy — Bankruptcy notice specifying sum more than that was due — Dispute as to amount specified in notice — Notice not required to comply with s. 7(1) of the Courts of Judicature Act, 1964 — Bankruptcy Ordinance, 1959, s. 3(2).

Income Tax — Recovery of — Penalty under s. 84 (1) Income Tax Ordinance, 1947 — Demand note — Whether to be served on judgment debtor.

On July 3, 1964, the Comptroller of Income Tax obtained judgment against the appellant in the sum of $309,660, being the amount of tax due from him, and 5% penalty imposed by virtue of the provision in section 84(1) of the Income Tax Ordinance, 1947. After the judgment, the appellant's objection to the assessed tax came before the Board of Review. By agreement the tax payable was reduced by $191,839.20. The sum was further reduced by payments made by the appellant. In 1967, the appellant received a bankruptcy notice dated August 17th. The amount of tax payable at that date was $50,240.45. The notice specified the amount of $54,826.68 owing from the appellant — the excess being the penalty under section 84(1) of the Income Tax Ordinance.

Within the time specified in section 3(2) of the Bankruptcy Ordinance, 1959, the appellant gave notice disputing the validity of the notice. Two objections were raised to the notice:— (1) the sum specified in the notice exceeded the amount actually due, as the comptroller was not entitled to impose the penalty under section 84(1)(a) of the Income Tax Ordinance without the prior service of a demand note as required by section 84(1)(b) of the Ordinance; (2) the notice was not issued and expressed to be issued by the Chief Justice of the High Court in the name of the Yang di-Pertuan Agong, as required by section 7(1) of the Courts of Judicature Act, 1964.

Held, the appellant's objections failed for the following reasons: (1) section 84(1)(b) of the Income Tax Ordinance requires the demand note to be served only when a person has been assessed to tax for the first time. It does not require the comptroller to serve a demand note on a judgment debtor like the appellant, before the penalty could be added to the tax payable. The amount specified in the bankruptcy notice was therefore the amount actually due from the appellant; (2) a bankruptcy notice, to be valid, need only comply with section 3(2) of the Bankruptcy Ordinance, 1959. It need not be issued and expressed to be issued by the Chief Justice in the name of the Yang di-Pertuan Agong.

Case referred to:—

(1) *Re Arunachalam, ex parte Indian Overseas Bank Ltd.* [1968] 1 M.L.J. 89.

FEDERAL COURT.

Jagjit Singh for the appellant.

Nik Saghir for the respondent.

Suffian F.J.: The Comptroller of Income Tax (respondent) served a notice of assessment on the appellant. The appellant did not pay the tax which the notice said he should pay. He appealed against the amount assessed. This, of course, did not affect his liability to pay; section 82 of the Income Tax Ordinance, 1947, provided that notwithstanding the appeal, the appellant must nevertheless pay within one month. Without this provision, every tax-payer could object and postpone paying for years until the courts have decided the matter disputed.

The appellant did not pay within one month. So the comptroller sued him. On 3rd July, 1964, he obtained judgment (in Penang High Court Civil Suit No. 113 of 1963) against the appellant in the sum of $309,660. This judgment was obtained under sections 82 and 86. The sum included $14,745.68 being 5% penalty under section 84(1) on tax unpaid within one month.

Section 84 provided:—

"(1) Subject to the provisions of sub-section (3) of this section, if any tax is not paid within the periods prescribed in section 82 of this Ordinance:—

(a) a sum equal to five per centum of the amount of the tax payable shall be added thereto, and the provisions of this Ordinance relating to the collection and recovery of tax shall apply to the collection and recovery of such sum;

(b) the comptroller shall serve a demand note upon the person assessed; and if payment is not made within one month from the date of the service of such demand note, the comptroller may proceed to enforce payment as hereinafter provided;

(c) a penalty imposed under this sub-section shall not be deemed to be part of the tax paid for the purpose of claiming relief under any of the provisions of this Ordinance.

(2) (Repealed by Ordinance No. 11 of 1948).

(3) The comptroller may, for any good cause shown, remit the whole or any part of the penalty due under sub-section (1) of this section."

After the judgment, the appellant's objection to the assessed tax came up before the Board of Review. We were told from the Bar that the Board asked the comptroller and the appellant to get together and agree the tax payable. They got together. The comptroller reduced the tax by $191,839.20. The penalty under section 84(1) was 5% of the unpaid tax; so the comptroller also reduced the penalty.

Still the appellant did not pay, at least not in full. He said that the matter was complicated by the nature of his business which was on a very large scale.

There must have been discussions between his accountants and the comptroller's office. One of them is mentioned in a letter dated 16th August, 1965, from Mr. H. L. Edwards, the Assistant Comptroller in Penang. In it Mr. Edwards confirmed that after taking various matters into account, the tax payable by the appellant on that date was $60,240.45. Then on 25th April, 1966, the appellant paid $5000 and on 5th August, 1966, he paid another $5,000.

If what Mr. Edwards said in his letter was correct, the balance due from the appellant would then be $50,240.45.

Imagine therefore his surprise (so we are led to believe) when in 1967 he received a bankruptcy notice dated 17th August saying that he owed the comptroller not $50,240.45 but $54,826.68.

The law applicable then was the Bankruptcy Ordinance No. 20 of 1959. Section 3(2) thereof provided:—

"A bankruptcy notice under this Ordinance shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:—

Provided that a bankruptcy notice —

(i) (not relevant);

(ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; . . . ."

It is undisputed that if the sum specified in the bankruptcy notice exceeds the amount actually due, then it is void (*Re Arunachalam , ex parte Indian. Overseas Bank Ltd.*[1]).

Within the time prescribed by section 3(2) the appellant gave notice disputing the validity of the notice.

The judge held the notice valid and the appellant appeals to this court.

Mr. Jagjit Singh argued before us that the notice was invalid for two reasons:—

(a) the notice specified a sum in excess of the amount actually due; and

(b) the notice was not issued or expressed to be issued by the Chief Justice of the High Court in the name of the Yang di-Pertuan Agong as required by section 7(1) of the Courts of Judicature Act, 1964.

As regards the first ground, in my opinion, the amount mentioned in Mr. Edward's letter was only in respect of tax due. This letter did not, in my judgment, preclude the comptroller from adding a penalty to the tax.

It is important to bear in mind that the comptroller wants to bankrupt the appellant, not on the notice of assessment but on the judgment. The notice of assessment must have said that payment must be made within a month (section 82) or else pay a penalty also (section 84). Once judgment had been obtained, the liability for tax on the assessment notice and for penalty under section 84 was extinguished and replaced by liability on the judgment alone. So, when subsequent to the judgment the comptroller agreed that a lesser sum was due by way of tax (the amount due on 16 August, 1965, was confirmed in Mr. Edward's letter), it was quite proper for him to reduce the penalty as well. What he did was to reduce a penalty which a court had said the appellant must pay. Mr. Jagjit Singh submitted that the comptroller should first have served a demand note under paragraph (b) of section 84(1) before he could impose a penalty under paragraph (a). The comptroller was not imposing a penalty for the first time. In my judgment there was therefore no need for him to serve a demand note on the appellant under paragraph (b) of sub-section (1) of section 84. A demand note is required only when a person has been assessed to tax for the first time, not against a judgment debtor like the appellant.

If penalty could be added to the tax due mentioned in Mr. Edwards' letter, then the amount specified in the bankruptcy notice was the amount actually due. I say so because, for the reasons given by the learned trial judge, the correct amount of penalty had been added. Therefore the first ground of appeal fails.

I now deal with the second ground.

Section 7(1) of the Courts of Judicature Act, 1964, reads as follows:—

"All summonses, warrants, orders, rules, notices and mandatory processes whatsoever, whether civil or criminal, shall be issued and shall be expressed to be issued by the Chief Justice of the High Court issuing the same in the name of the Yang di-Pertuan Agong and shall be signed by a registrar of such court; and every such summons, warrant, order, rule, notice and mandatory process shall be sealed with the seal of the court issuing or making the same."

That provision is a general provision. Bankruptcy is a special matter and it is dealt with by special law. Because *generalia specialibus non derogant*, I hold that the bankruptcy notice, to be valid, need only comply with section 3(2) of the Bankruptcy Ordinance, 1959 (now section 3(2) of the new Bankruptcy Act, 1967). It need not be issued and expressed to be issued by the Chief Justice in the name of the Yang di-Pertuan Agong. This bankruptcy notice was in the prescribed form and is therefore valid. There is no need for me to consider the effect of the other provisions cited by Nik Saghir, namely, section 131 of the Bankruptcy Ordinance, Bankruptcy rule 289 and section 72 of the Courts of Judicature Act, 1964.

The second ground of appeal also fails.

I would accordingly dismiss this appeal with costs.

Barakbah L.P. and Ismail Khan J. concurred.

Appeal dismissed.

PUBLIC PROSECUTOR v. ABDUL MAJID

[A.Cr.J. (Raja Azlan Shah J.) February 17, 1968]

[Malacca — Criminal Appeal No. 1 of 1968]

Penal Code ss. 392 & 394 — Armed robbery at night — Sentence — Inadequate sentence.

A sentence of nine months' imprisonment is manifestly inadequate on a charge of armed robbery by night in the course of which one of the victims was badly assaulted. Sentence enhanced to two years. *Public Prosecutor* v. *Yap Chong Fatt* (1) distinguished.

Case referred to:—

(1) *Public Prosecutor* v. *Yap Chong Fatt* [1963] M.L.J. 136, 137.

MAGISTRATE'S CRIMINAL APPEAL.

Abdullah bin Ngah (Deputy Public Prosecutor) for the appellant.

Respondent/Accused in person.

Raja Azlan Shah J.: This is an appeal against conviction. The appellant was found guilty under section 392 Penal Code read with section 394 and was sentenced to nine months imprisonment. Shortly stated, the facts are that the accused with three other persons at large committed armed robbery on July 26, 1967 and in the course of the robbery he assaulted one of the victims. The learned president in imposing sentence of nine months imprisonment was influenced by the observations of the learned Chief Justice in the case of *Public Prosecutor* v. *Yap Chong Fatt.*(1) I quote the relevant passage:—

"If the offence is too serious for that and merits imprisonment then a sentence of imprisonment should be imposed which will have some effect not only on the offender but also as a deterrent and which will give the prisons department some opportunity of trying to remedy such defect of character of there may be. In my opinion the proper sentence in this case, if the accused was not to be bound over and if imprisonment was thought necessary (and it probably was necessary) was one of something from nine months to a year".

Now, that was a case of house-breaking where the accused was sentenced to two weeks imprisonment which he duly served. The amount of property involved was $50. The accused was a first offender. In my view, the present case is on a different plan altogether. This is a case of armed robbery by night in the course of which one of the victims was badly assaulted. The facts are therefore different from that of *Yap Chong Fatt's* case and therefore different considerations apply in order to strike a fair balance between the interests of the accused on the one hand and the interests of the public on the other.

It is my judgment that the observations relied upon by the learned president should be understood as stating a general proposition relating to the peculiar circumstances of that case. It merely lays down broad principles of law in the assessment of punishment and it may form a useful guide in similar cases. The sentence in the present case is manifestly inadequate. I increase the sentence to two years to take effect from the date of arrest.

Sentence enhance.